IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1866

PAUL BOSWELL, LUNCEFORD G. BOSWELL, A. JAMES ELLIOTT, RONALD L. REID, MRS. LYNN P. COCHRAN, B. HARVEY HILL, JR., ROBERT W. HURST, ROBERT L. STEED, CARL H. COFER, ROBERT S. BEAUCHAMP, PEYTON C. HAWES, JR., MARK J. LEVICK, CHARLES L. SCHREEDER, THE SURRO CORPORATION, JIM DODSON, PATRICIA W. WOMACK and MILDRED WARD HILLSMAN, as Executrix under the Will of J. C. HILLSMAN, *Petitioners*

v.

GEORGIA POWER COMPANY, *Respondent*

RESPONSE OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

Page

STATUTES:

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QUESTION PRESENTED

Are state statutory laws and court decisions binding on a federal district court when the question for decision is one involving that portion of the Fifth Amendment to the United States Constitution which provides "nor shall private property be taken for public use, without just compensation," in a condemnation case where a licensee of the Federal Power Commission is condemning private property pursuant

to federal statutory authority conferred upon the licensee by § 21 of the Federal Power Act? (16 USC § 814) (1970)

STATEMENT OF THE CASE

First, we believe the following corrections and/or clarifications to petitioner's Statement of the Case are in order and appropriate:

(a) On page 7 of the Petition there is stated:

"... In the majority panel opinion, Judge Wisdom started from the premise that, despite the Rules of Decision Act, 28 USC § 1652 (1970), federal courts should always apply federal rules of valuation in condemnation actions 'unless there are circumstances unique to a Federal condemnation under § 21 which require the opposite result.' Appendix, p. 15 a."

Judge Wisdom actually stated:

"Courts apply independent rules, however when considering the specific issue of compensation in federal condemnations. E.g., *United States* v. *Miller,* 1943, 317 U. S. 369, 380, 63 S. Ct. 276, 87 L. Ed. 336; *United States* v. *Certain Property Located in Borough of Manhattan,* 2 York, 2 Cir. 1948, 165 F.2d 526, 528 (L. Hand. J.); *United States* v. *Certain Parcels of Land,* 3 Cir. 1944, 144 F.2d 626, 628; *United States* v. *3,595.98 Acres of Land,* 1962 N. D. Cal., 212 F. Supp. 617; 12 Wright & Miller, *Federal Practice and Procedure;* Civil; § 3042 (1973). These cases did not arise in the specific context of a federal condemnation by the Federal Power Act licensee pursuant to Section 21. Nevertheless, we should follow the same rule unless there are circumstances unique to a federal condemnation under Section 21 which requires the opposite result." Appendix 15a.

(b) On page 8 of the Petition there appears the following:

"... Applying the 'balancing test', the majority found the balance to be tipped in favor of the application of a federal common law *essentially* because 'the use of state law could interfere with achievement of congressional aims' by *possibly* increasing the cost of the project to Georgia Power Company. Appendix pp. 23a-26a." (Emphasis added.)

As to this finding "the majority" stated:

"The balance tips toward the need of federal law. ... One possible reason for adopting state law as the federal rule of decision is the advantage of knowing what the state law says compared with the uncertainty as to the rules the federal courts would create. ... Since federal law on compensation already exists, there is no such reason to adopt state law here.

"Most importantly, federal common law of compensation is the appropriate choice in this case because the use of state law could interfere with achievement of congressional aims. Even when Congress passed the Federal Power Act in 1920 its primary concern was to stimulate private development of America's hydroelectric power resources. ... That goal has become even more significant with the energy shortages of the 1970s and the adoption of a national policy to reduce dependence on foreign sources of energy. To fulfill that congressional policy, hydroelectric development must be maximized. The use of state rules of compensation when they would produce a substantially higher award for the land owner could retard development and frustrate the goal of full utilization of hydroelectric resources. ...

"The federal government's option under § 14 of the Act, 16 USC § 807, to acquire a project at

the expiration of a license creates another United States interest in minimizing the cost of licensed facilities by applying federal valuation rules." Appendix 23a, 24a, 25a.

(c) It is stated on page 8 of the Petition that:

"In a sharply worded dissent, Judge Simpson . . . suggests that the majority's concern for speculative and attenuated national interest which tipped the balance here toward the need for a federal law is precisely the same type of misplaced concern which caused the Supreme Court to reverse the Fifth Circuit in *Wallis* and *Miree*. Appendix pp. 41a-43a."

The majority answered Judge Simpson's criticism to their conclusions wherein it is stated by the majority as follows: "Judge Simpson disputes this conclusion. He says our concern that Georgia law may interfere with the development of hydroelectric power has led us down the wrong path traveled by the panel majority in *McKenna* v. *Wallis*. Dissenting opinion, slip opinion at page 961, at page ——. We disagree." Then the majority proceeds at length justifying its position. (Footnote 27, Appendix pp. 26a and 27a.)

(d) Petitioners conclude their Statement of the Case with the following: "Petitioners . . . now seek review, contending that the choice of law principles articulated by the Supreme Court in *Parnell, Wallis, Yazell* and *Miree* demand that state law be applied by federal courts in every case unesss 'a uniform national policy is necessary to further the interest of the federal government.' *Miree* v. *DeKalb County,* supra, at 29."

Parnell, Wallis and *Miree* were in the federal forum because of diversity of citizenship; *Yazell* was

in the federal court because the United States, through the Small Business Administration, was the party plaintiff in the case.

In *Wallis,* (*Floyd Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63 (1966), as well as in *Miree* (*Miree* v. *DeKalb County,* 433 U. S. 25) (1977), the questions for determination were the "property" rights of private parties under contracts.

In *Wallis,* the contract involved contended property rights of private parties with respect to a lease made to one of such parties by a government agency pursuant to an Act of Congress which authorizes the agency to make such contract, and in *Miree,* plaintiffs were seeking damages from the defendant for multiple deaths arising out an an airplane crash, on the theory that causation was a breach of a contract between the defendant and the Federal Aviation Administration, and on the basis that the plaintiffs, though not parties to the contract, were the third-party beneficiaries thereof.

In *Parnell,* (*Bank of America* v. *Parnell,* 352 U. S. 29 (1956) the plaintiff sought recovery from the defendants of the principal redemption amount of certain government (Home Owners Loan Corporation) bonds allegedly stolen from plaintiff. The question for determination was the applicability of state or federal law with respect to evidentiary aspects of "burden of proof and good faith."

In *Yazell* (*United States* v. *Ethel Mae Yazell,* 382 U.S. 341 (1966), the United States was suing on a SBA loan made to the Yazells, due to loss to their small mercantile establishment as a result of a flood; the government having foreclosed a mortgage on the

stock of goods, and the action was for the deficiency of $4,000. The question was whether Texas coverture law applied, which gave Mrs. Yazell immunity from liability as to her separate estate. The court applied state law, principally because the loan was executed by SBA with the knowledge of, and in the face of, and on the basis of coverture immunity of Mrs. Yazell.

In *Wallis, Miree* and *Yazell,* three of the four cases relied upon by Petitioners, the question was the determination of the applicable law to rights asserted, or opposed, which grew out of contractual obligations; and *Parnell,* the fourth such case, involved only the question of applicable law as to burden of proof and good faith.

Such four cases, ***neither singly nor jointly,*** so relied upon by Petitioners, derive (1) the subject matter of the litigation, (2) the rights sought to be enforced, (3) the power to enforce such rights, (4) the forum to execise such power and to enforce such rights, and (5) the procedure to be followed in the exercise and enforcement of such rights as an "agent" of the United States, from Acts of Congress, as does Respondent Georgia Power Company, 16 USC § 814 and Rule 71A, Civil Rules of Procedure.

In *Parnell,* a diversity case, the court summarily dealt with the question here involved, wherein the court stated: "The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of government paper between private parties, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular state regarding the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern." At pages 33 and 34, 352 U.S.

In *Wallis,* a diversity case, the court portrays the lack of federal, national concern in the litigation wherein the court states: "The question before us is whether in general, federal or state law should govern the dealings of private parties in an oil and gas lease validly issued under the Mineral Leasing Act of 1920.[5]"

The footnote No. 5 states:

> "How possible federal rules would differ from those used by Louisiana has not been specified precisely. The Court of Appeals intimated that the devices of resulting and constructive trusts, said not to be recognized in Louisiana, might be available under federal law and useful to respondents. It may be thought that federal law would not embody a statute of frauds so oral understandings could be proved. In this instance, we believe the question of applicability of state versus federal law can be decided without further refinement of the issue." 384 U. S. at 66, 67.

In *Yazell,* the $4,000 deficiency lawsuit against Mrs. Yazell, who operated with her husband "a small shop to sell children's clothes," the Court upheld the decision of the circuit court, stating: "We hold that in the circumstances of this case, the state rule gov-

erns . . ." Some of the "circumstances" were the loan "was negotiated with specific reference to Texas law, including the peculiar acknowledgment set forth above" (necessarily executed by Mrs. Yazell to cover her interest in the stock of goods mortgaged); that the Small Business Administration "was aware and is chargeable with knowledge that the contract would be subject to the Texas coverture" (the law immunizing Mrs. Yazell from liability); "that both the SBA and the Yazells entered into the contract without any thought that the defense of coverture would be unavailable to Mrs. Yazell with respect to her separate property as provided by Texas law"; "and that, in the circumstances, the United States is seeking the unconscionable advantage of recourse to assets for which it did not bargain." 382 U.S. at 346.

In *Miree* (*Miree* v. *DeKalb County,* 433 U.S. 25, (1977), a diversity case, the court indicates that in cases where federal jurisdiction is based on diversity of citizenship, the application of federal common law to resolve the issue presented necessitates and requires the establishment of "a uniform national rule, . . . to further the interest of the federal government . . .," p. 27, and indicates that if a federal statute is the source of the right sued upon or the authority being exercised, then the federal law applies. P. 31.

Miree cites the case of *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173 (1942), for the proposition that federal common law may govern even in diversity cases. Sola holds that where a federal statute condemns or makes unlawful the performance of a certain act but is silent upon the penalties or damages consequent upon commission of such prohibitive

act, federal law is applicable in determining the penalty or damages, and state law to the contrary must succumb. By analogy, we submit, that if a federal statute gives an authority or right to perform an act but is silent upon the consequences, penalties or damages occasioned by exercise of such right, then necessarily the federal law must apply in determination thereof, contrary state law notwithstanding.

> "When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal policy and statute, conflicting state law and policy must yield."
>
> *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173, (1942)

REASONS FOR DENYING THE WRIT

1. Fifth Amendment United States Constitution Applies

Determination of the Fifth Amendment "just compensation" under federal statutory condemnation requires federal law resolution.

16 USC § 814 (Petition, pp. 4, 5) gives a Federal Power Commission licensee full power to condemn lands for fulfillment of the license purposes in the federal district court wherein the land lies. At the time of passage of such Act, the year 1920, there was no general applicable federal procedure for such cases. The Act provided for utilization of the state *procedures* wherein the property lies. There was then existent federal substantive court established law for

determination of the "just compensation," and thus such Act provided for none.

In this regard, the Circuit Court states:

> ". . . (T)he Federal Power Act contains many explicit acknowledgements of state authority . . . The failure to mention specifically state laws of eminent domain contrasts with these provisions, and suggests, if anything, that Congress did not believe it necessary to follow state eminent domain rules or desire courts to do so." Appendix 9a and 10a

It is inconceivable that Congress intended other than that the Fifth Amendment to the United States Constitution, with respect to the taking of private property for public purposes, would apply in condemnation cases by a licensee of the Federal Power Commission pursuant to 16 USC § 814. The federal Constitution provides for "just compensation."

The Constitution of the State of Georgia provides "private property shall not be taken *or damaged,* for public purposes, without just and adequate compensation being first paid . . ." (Emphasis added.) Article I, Sec. III, Par. I, Constitution of the State of Georgia of 1976. Attorney fees and expenses of litigation are allowed a condemnee-landowner under the Georgia law (Petition, p. 6, Footnote 2), and this allowance is made on the basis of the "damage" provision in the Georgia Constitution. *White* v. *Georgia Power Co.,* 237 Ga. 341, 342; 227 SE2d 385, 386.

> "When it condemns land under § 21, a licensee acts as the agent of the United States government. *Tuscarora Nation of Indians* v. *Power Authority,* 2nd Cir. 1958, 257 F2d 885, 894, vacated as moot sub nom, *McMoran* v. *Tuscarora Nation of Indians,* 362 U. S. 608, 80 S. Ct. 960, 4 L.Ed2d 1009."

Appendix 5a and 6a.

> "We find that the source of the power to condemn property contained in § 21 is federal. Eminent domain inheres in sovereignty See *Kohl* v. *United States,* 1876, 91 USC 367, 23 L.Ed. 449. . . .
>
> ". . . The Supreme Court has held that . . . 'The measure of compensation (is) grounded upon the Constitution of the United States.' *United States* v. *Miller,* 1943, 317 U.S. 369, 380 63 S. Ct. 276, 283, 87 L.Ed. 336 . . . The appellants (petitioners here) attempt to distinguish *Miller* on the ground that the plaintiff was United States rather than a private licensee. We cannot see why in this context the identity of the plaintiff would change the meaning of virtually identical language . . ."

Appendix 5a and 7a.

2. Court Did Not "Reserve" Opinion In Grand River Dam Case

Petitioners' contention that this Court has expressly reserved opinion on the applicable law in such a case as the instant one is not justified. While it is true that in *Grand River Dam Authority* v. *Grand-Hydro,* 335 U. S. 359, this Court, affirmed the Supreme Court of Oklahoma in a state court condemnation proceeding, brought under state law with respect to compensation, and while it is true that this Court stated that it was expressing "no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States or by one of its licensees in reliance upon rights derived under the Federal Power Act," we respectfully sub-

mit that this Court did not "expressly reserve" an opinion thereon. In that case, Grand River Dam Authority filed its condemnation proceeding under the state law of Oklahoma at a time when it had eminent domain power from the state of Oklahoma, but did not possess a license from the Federal Power Commission, but pending that state court proceeding it did obtain such a license, and without amending its case and proceeding in its capacity as a Federal Power licensee under 18 USC § 814, it continued to proceed with its same state authority and was making the contention that simply because it had acquired a federal license, the state law on values was preempted by the federal law. With this contention, Grand River got no reception.

We believe what the Supreme Court was saying in *Grand River,* by the use of its language cited above, and on page 10 of the Petition, was that the appropriate measure of value in a condemnation brought by the United States, or by one of its licensees under the Federal Power Act, would be the same and that the federal law of value would apply even though the action were brought in the state court; the same as the Circuit Court of Appeals in this case has stated in its decision. Appendix 27a et seq.

3. No Conflict In Court of Appeals Decision With Decisions of Fourth, Eighth and Ninth Circuits

The decision of the Court of Appeals in this case is *not* in conflict with decisions of courts of appeals of the Fourth, Eighth or Ninth Circuits.

On page 10 the Petition states: "The decision of the Court of Appeals here directly conflicts with at least seven decisions of the Court of Appeals of the

Eighth Circuit. The Eighth Circuit decisions, headed by *Feltz* v. *Central Nebraska Public Power and Irrigation District,* 124 F2d 378 (8th Cir. 1942) and listed in Footnote 18 of the majority opinion of the Court of Appeals (Appendix, p. 11a), expressly holds that the substantive laws of the forum state apply in actions under § 21 of the Federal Power Act."

This statement of petitioners is simply not a correct statement.

Continuing with the Petition, it is stated: "The majority opinion of the Fifth Circuit dismisses this line of cases because of 'the absence of any reasoned discussion'. Appendix, pp. 11a-12a."

This quotation from the decision of the Court of Appeals in this case is taken out of context, would appear to be the complete statement of such court with reference to the matters referred to; and this is not correct factually. What the Court of Appeals did say about *Feltz,* among other things, is as follows:

> ". . . Without articulating its reasoning, the court indicated that Nebraska law controlled both issues. There is no indication that the parties contested this issue or that the court gave it any serious consideration. Indeed, because of the mixture of issues each party may have thought it to his advantage to rely upon the state law . . . The specific issue of just compensation raised before this court was not considered. The other Eighth Circuit cases also lack any discussion of a general choice of law problem or of the specific issue before us. In the absence of any reasoned discussion of the difficult choice of law issue, we cannot accept these cases as persuasive authority or interpret congressional inattention to them as an endorsement of the view that the state law should

fill all substantive gaps in Sec. 21." Appendix, p. 21a.

In all of the Eighth Circuit cases *Central Nebraska Public Power and Irrigation District* is the one exercising the power of eminent domain. The first of these cases, *Feltz* v. *Central Nebraska Public Power and Irrigation District,* does not specifically so state, but it is apparent from a reading of that case that the power of eminent domain was being exercised under eminent domain powers granted by the State of Nebraska, that both parties were traveling on the basis that state law applied, and no issue was made or mentioned as to federal law being applicable as opposed to state law.

The next Eighth Circuit case, *Central Nebraska Public Power and Irrigation District* v. *Harrison,* 127 F2d 588, discloses on its face in quotations from the petition to condemn that the proceeding was brought in accordance with the state law of Nebraska, wherein it is stated, at page 589, as follows:

> "The District commenced its condemnation proceeding on March 27, 1940 . . . in which it alleged, among other things, . . . 'that applicant is entitled to the appointment of appraisers to appraise said land for the condemnation of the same *in accordance with the laws of Nebraska,*' in which it prayed that the court appoint appraisers to 'inspect and view said lands and to assess the value of said lands and any damages which the owners . . . may sustain by reason of the appropriation thereof.' " (Emphasis added.)

In all of the other Eighth Circuit cases there is nothing appearing from the reported cases that either

party contended federal law as to determination of compensation applied.

Petitioners claim a conflict in the Court of Appeals decision in this case and the decision in the case of *Oakland Club* v. *South Carolina Public Service Authority,* 110 F2d 84 (4th Cir. 1940), wherein the Fourth Circuit Court upheld a finding by the district court in that case that § 21 of the Federal Power Act is complimentary to the state law, enabling a licensee to exercise in federal courts the substantive rights of eminent domain granted to it under the state law in cases where the federal law made no provision but the state law did.

We have nothing like that here, and in none of these cases involved would the federal district court have any sort of jurisdiction and authority to apply any state law. Rule 71A of the Federal Rules of Civil Procedure was not in being in the year 1940, the vintage of *Oakland Club,* but with the instant cases 16 USC § 814 and Rule 71A, together with the applicable portion of the Fifth Amendment to the United States Constitution and federal decisions thereunder, provide a complete set of rules for practice, procedure and determination of compensation in eminent domain cases. *State of Washington* v. *FPC,* 207 F2d 391 (9th Cir. 1953), *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, (1958)

In the instant cases, there being no diversity of citizenship and the actions being brought under 16 USC § 814, the ruling of this Court in *Kohl* v. *United States,* 91 U.S. 367, 23 L.Ed 449 (1876), would make it impossible for the district court to have applied state law; *Kohl* stating: " . . . If the United States

have the power, it must be complete in itself. It can neither be enlarged nor diminished by a state. Nor can any state prescribe the manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment. Such a consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired."

The Circuit Court fully and completely answered Petitioners' cntention with respect to the Eighth Circuit Court cases and that of the Fourth Circuit. Appendix, p. 11a et seq.

Next Petitioners contend there is a conflict between the decision of the Court of Appeals in this case and the case of *Public Utility District No. 1* v. *City of Seattle,* 382 F2d 666 (9th Cir. 1967), based on the fact that the Ninth Circuit Court held that the Utility District in that case would have to pay for shorelands and power site values, whereas had the United States itself been acquirer, no compensation need be paid therefor because of its dominant navigational servitude.

We can add nothing to what the Circuit Court of Appeals had to say about this contention, as follows:

> "Whether a licensee enjoys the dominant navigational servitude is irrelevant to the issue before us, The Ninth Circuit did not question that Sec. 21 delegates some of the federal government's powers. And the opinion does not support the contention that a licensee enjoys anything less than the full federal power to condemn private property. Significantly, when the Ninth Circuit turned to the amount of compensation due the shoreland and upland property owners, *it relied exclusively on federal cases.* See 388 F2d 673-74." (Emphasis added.)

Appendix, p. 17a.

4. No Conflict In Court of Appeals Decisions With Parnell Nor Its Progeny

The decision of the Court of Appeals in this case is not in conflict with choice of law principles developed by this Court in *Bank of America* v. *Parnell,* 352 U.S. 29 (1956), nor its progeny.

Petitioners contend that the Court of Appeals in this case, in applying the "balancing test," did not include certain factors which this Court has considered in developing principles with respect thereto.

The Court of Appeals in its decision covers every facet of the "balancing test" principles in its decision, beginning Appendix 14a through 29a, embracing the following principles:

(a) "Because the source of the power delegated by the Federal Power Act is federal, the governing law must be federal." Appendix, p. 14a.

(b) "Courts apply independent rules, however, when considering the specific issue of compensation in federal condemnations." Appendix, p. 15a.

(c) "Unless we find the weights on our scale to be substantially different, we see no reason to diverge from the conclusion of the Supreme Court and some of our courts of appeals." (The court is referring to the balancing test), Appendix, p. 16a, Footnote 21.

(d) As to the intent of Congress with respect to the national interest as pertains to authority given a

licensee, the Court of Appeals in this case cites the following excerpts from *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U. S. 99, (1960), as follows:

> "But "Sec. 177 (25 USC) is not applicable to the sovereign United States *nor hence to its licensees* to whom Congress has delegated federal domain powers under Sec. 21 of the Federal Power Act." Appendix 18a.

(e) The Court of Appeals reviews very carefully, and in detail, the cases of *Clearfield Trust, Parnell, Wallis, Miree, Yazell* et al., and their specific holdings as applied to the facts therein involved, thus taking into consideration in its decision in this case all principles embodied in such cases. Appendix 20a, 21a.

The Court of Appeals, with respect to these cases, concludes: "Together these cases produce a balancing test. . . . On one side is the federal interest in carrying out a program in the most efficient and effective manner possible. On the other is a state's interest in the preservation of its control over local interests, particularly traditional interest, such as family law and real property transactions, and in preventing displacement of state law. Of course, the ultimate goal of the creation of federal law by courts is to carry out the federal program in question. Thus, if state law would actually frustrate rather than only hinder a federal program, federal common law *must* be applied regardless of state interest. . . . On the other hand, the Supreme Court has demonstrated a growing desire to minimize displacement of state law. . . ." Appendix, p. 21a, 22a.

(f) Then the Court of Appeals "weighs" the factors which each side has submitted for its side of the scales, Appendix, 22a, 23a, and concludes that "the balance tips toward the need for federal law. . . . Since federal law on compensation already exists, there is no (such) reason to adopt state law here." Appendix, p. 23a.

(g) The Circuit Court then states: "Most importantly, federal common law of compensation is the appropriate choice in this case because the use of state law could interfere with achievement of congressional aims"; and then follows its elaboration for justification of its quoted statement, including increased costs of the project to the licensee which would interfere with the national interest in reducing energy costs and the ultimate cost to the federal government if its option under 16 USC § 807 were exercised and the project acquired by the United States. Appendix 24a-27a.

(h) The finding and rulings of this Court in the case of *First Iowa Hydro-electric Co-operative* v. *Federal Power Commission,* 328 U. S. 152, (1946), should satisfactorily answer the requirements of "a significant conflict between some federal policy or interest and the use of state law in the premises," and the interest to be protected should be "uniform in character throughout the nation," with respect to the "balancing test" referred to in the Petition, pp. 12 and 13, to-wit:

> "The closeness of the relationship of the federal government to these projects (hydro-electric projects of licensee of Federal Power Commission) and its obvious concern in maintaining control over their engineering, economic and finan-

cial soundness is emphasized by such provisions as those of § 14 authorizing the federal government, at the expiration of a license to, take over the licensed project by payment of 'the net investment of licensee in the project or projects taken, not to exceed the fair value of the property taken,' plus an allowance for severance damages. . . .

". . . It (Federal Power Act of 1920) was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the nation. . . .

"It was a major undertaking involving a major change of national policy. . . .

"The detailed provisions of the Act providing for the federal plan of regulation leaves no room or need for conflicting state controls.[25]" The footnote 25 provides in part as follows:

". . . § 14 recapture of projects and payment for them by the government upon expiration of the licenses, thus giving the government a direct interest in and need for control of every feature of each licensed project. . . ." pp. 172-173, 180, 181.

5. If Georgia Compensation Law Applies Here, All Georgia Condemnation Law Must Apply, Thwarting Federal Power Commission and Federal Court Prerogatives

If Georgia law as to compensation determination is applicable, then all other Georgia eminent domain applies.

If the courts hold that the law of Georgia applies in determining the compensation to landowners in cases such as these, it would appear that all other

Georgia law pertaining to the rights of landowners in eminent domain cases will control, such as:

(a) "Upon the payment by the corporation or person seeking to condemn, the amount of the award, and final judgment on appeal, such corporation or person shall become vested with such interest in the property taken as may be necessary to enable the corporation or person taking to exercise its franchise or conduct its business; and whenever the corporation or person shall cease using the property taken for the purpose of conducting its business, said property shall revert to the person from whom taken, his heirs or assigns; . . ."

Ga. Laws 1894, p. 99, as amended Ga. Laws 1914, p. 61; Title 36, § 606 of 1933 Code of Georgia Annotated.

(b) "Where the route (for a railroad line) selected and sought to be condemned . . . ran near the cotton mill of the owner . . . it was error to exclude testimony offered (by the landowner) for the purpose of showing that such company acted in bad faith in selecting the route it did select, to the effect that the portion of the land over which such route was selected was the only location on such land on which its mill could be scientifically and economically enlarged, and that to enlarge the plant at any other location on said land would necessitate the building of a new and independent mill which could not be operated in connection with the existing plant.

"A party having the right of condemning private property for public purposes can only condemn such amount thereof as is useful, needful and necessary for public purposes. If such party, in condemnation proceedings makes an effort to condemn more land than is necessary for public purposes . . . the owner of such land has

the right to have a court of equity intervene and enjoin the condemnation of such of his lands as is not necessary for public purposes."

Piedmont Mills v. *Georgia Railway & Electric Co.,* 131 Ga. 129; 62 S.E.52. (1908)

(c) ". . . The remedy of the landowner is to apply to a court of equity to enjoin illegal (condemnation) pleadings. . . .

". . . Here the condemnor seeks a judgment which will prevent the condemnee from erecting on the premises involved (easement for transmission line right-of-way) any building or structure other than fences. Such an interest is broad enough to prohibit the condemnee as the owner of the fee from erecting on his land any building or structure which will not interfere in any way with the full and complete use of the easement rights which the condemnor seeks to acquire by its condemnation proceeding, or after the erection thereof to require their removal therefrom by any appropriate legal or equitable proceeding.

". . . Conceivably, the condemnee may in the future desire to place or erect structures or other improvements on such land which will not interfere with the full and complete use and enjoyment of the easement which the condemnor seeks to acquire by this condemnation proceeding and this, we hold, it should have a right to do."

B. & W. Hen Farm, Inc. v. *Georgia Power Co.,* 222 Ga. 830 152 S.E.2d 841 (1966).

The application of such Georgia law would be an allowance of what this Court condemned in *First Iowa Hydro-Electric,* supra, wherein this Court stated:

". . . It (the requiring of licensee of Federal Power Commission to obtain state permit for hydro-electric project) would subordinate to the

control of the state the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government."

228 U. S. 164

6. Court Decisions Which Require Application of Federal Law Here Irrespective of and Diregarding "Balancing Test"

We respectfully submit that the following rather closely related principles of law laid down by this Court require the application of federal law to the ascertainment of just compensation in the case here involved, and similar cases, without any application of the "balancing test."

". . . There (in Erie RR. v. Thompkins, 304 U. S. 64 (1938), we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by *the sweep of federal statutes* that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. (Citing authority). When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield . . ." (Emphasis added.)

Sola Electric Co. v. *Jefferson Electric Co.,* 317 U.S. 173, 175, (1942)

"... These laws, like other laws of the United States enacted pursuant to constitutional authority, are the supreme law of the land. (Citing authority.) When the state law touches upon the area of these federal statutes, it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law. (Citing authority.) This is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power."

Sears Roebuck & Co. v. *Stiffel Co.,* 376 U. S. 225, 229, (1964)

Accord, *Kewanee Oil Co.* v. *Bicron Corp.,* 416 U.S. 470, 479, 480, (1974)

"... Jurisdiction in the court below was based on diversity of citizenship, and, therefore, it would seem that in view of the decision of the United States Supreme Court in *Erie RR* v. *Tompkins* and *Klexton Co.* v. *Stempor Mfg. Co.,* one should turn to the whole law of New York, as a New York court would do, to decide the controlling rules of the decision for the case at bar. But it has also been suggested, and indeed on sound reason, that it is the *source of the right* sued on rather than the basis of federal jurisdiction which determines the law governing a particular case." (Emphasis added.)

Huber Baking Co. v. *Stroehmann Bros. Co.,* 252 F2d 945, 951 (2d Cir 1958) citing *Maternally Yours* v. *Maternity Shop, Inc.,* 234 F2d 538, 539 540 (2nd Cir.) (1956)

On page 15 of the petition, petitioner states, "It is also important to realize that this case marks the first time since *Erie R.R.* v. *Thompkins,* 304 U.S. 64 (1938), that a Federal common law has been applied

in litigation involving purely private parties and to which the United States is not a party."

Evidently, petitioners are not familiar with the case of *Richmond Elks Hall Assn.* v. *Richmond Redevelopment Agency,* 561 F.2d 1327 (Sept. 30, 1977) 9th Cir.

We were not aware of this case until just recently and feel confident that the Circuit Court of Appeals for the Fifth Circuit was not.

It was cited by none of the parties nor the Court.

That case is an *"inverse" condemnation* case brought by Elks Hall against Richmond Development, both private parties, with jurisdiction being invoked on the basis that private property was taken for public purposes without compensation in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. The property owner, Richmond Elks, among other things, *was contending for recovery of "litigation expenses, including attorneys' fees and expert witness fees".* Page 1328.

Richmond Elks was contending for its litigation expenses based on provisions of statutes pertaining to Department of Housing and Urban Development (HUD), contending for the same "under the Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation", and finally *on state law* "which specifically awards costs and expenses to owners that obtain judgments in inverse condemnation actions against public entities." Pages 1332, 1333. All of these bases for collection of litigation expenses were rejected, and

with respect to the state law basis of the claim the 9th Cir. stated:

> " . . . In rejecting this contention, the District Court relied on the Supreme Court's decision in *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116. 94 S. Ct. 2157, 40 L.Ed. 2nd 703 (1974), which reversed a decision of this circuit awarding attorney's fees in a suit brought under the provisions of the Miller Act. In *F. D. Rich Co.*, the Supreme Court observed:
>
> > '(t)he Miller Act provides a Federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of Federal not state law. Neither respondent nor the Court below offers any evidence of Congressional intent to incorporate state law to govern such an important element of Miller Act litigation as liability for attorneys' fees.'
>
> *Id.* at 127, 94 S.Ct. at 2164.

"We agree with the District Court . . ." 561 F2d 1333-4.

Next we turn to the *F. D. Rich Co.* case in this Court. This was a case that applied Federal law in a controversy between private parties; the office of the United States in this Court was nominal and its appearance therein was only to fulfill the technical necessity to sue for the use of the real party at interest, Industrial Lumber Company, Inc.

This Court stated:

> " . . . The Miller Act provides for a Federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of Federal not state law. Neither respondent nor the Court below offers any evidence of Congressional intend to incorporate state law to govern such an important element of Miller Act litigation as liability for attorneys' fees . . ." *F. D. Rich Co., Inc. f. U. S. for the use of Industrial Lumber Co., Inc.*, 417 U.S. 116, 127 (1974).

Likewise, as to Petitioners' comment on page 15 of the Petition that "This case marks the first time since Erie RR v. Thompkins, 305 U. S. 64 (1938) that a federal common law has been applied in litigation involving purely private parties and to which the United States is not a party," another such case applying the federal common law is *Public Utility District No. 1* v. *City of Seattle* (9th Cir. 1967), 382 Fed. 666; (1969) Cert. dismissed, 396 U.S. 803 and with respect to which the Court of Appeals in this case stated:

> "Whether a licensee enjoys the dominant navigational servitude is irrelevant to the issue before us. The Ninth Circuit did not question that § 21 delegates some of the federal government's powers. And the question does not support the contention that a licensee enjoys anything less than the full federal power to condemn property. *Significantly, when the Ninth Circuit turned to the amount of compensation due the shoreland and upland property owners it relief exclusively on federal cases.* See 382 F.2d at 673-74." (Emphasis added.) (Appendix 17a.)

Thus it is that the petition fails to demonstrate any justification for the grant of the writ sought under Rule 19 of this Court, or otherwise.

CONCLUSION

For all of the foregoing, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this case should be denied.

Respectfully submitted,

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